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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 651

GARNETT SEAY AND BILLY GADDIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–18) is reported at 217 F. 2d 572.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1954, and a petition for rehearing was denied January 10, 1955. On February 9, 1955, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Black to March 11, 1955. The petition was filed on March 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, under the circumstances of the case, the trial court should have declared a mistrial, following a single incident involving counsel and a witness who had become confused on dates, where the matter was fully developed before the jury who were instructed to consider it on the question of credibility, and where there was other evidence with respect to the significant dates.

STATEMENT

In the United States District Court for the Northern District of Georgia, the two petitioners, Garrett Seay and Billy Gaddis, were indicted, along with three co-defendants, for a conspiracy to violate various statutes relating to distilled spirits and for certain acts done in violation of these laws (R. 1–6). Two defendants, Richard Fricks and Arnold Smith, pleaded guilty (R. 60, 143). The remaining three defendants, including petitioners Seay and Gaddis, were found guilty on the conspiracy count and Gaddis was found guilty on the substantive charge of working at an unregistered still (R. 230). Seay was sentenced to three years' imprisonment and Gaddis to imprisonment for eighteen months (R. 231–235). On appeal, the judgments against petitioners were unanimously affirmed (Pet. 15–17).

1. *General summary of evidence.*—The government showed that a still, of a type commonly called a groundhog, was found by revenue agents

near the home of one Arnold Smith on July 24, 1952 (R. 33). The agents thereupon destroyed the still (R. 35). In October 1952, Gaddis admitted having worked at that still, but would otherwise give no information with respect thereto (R. 18–19, 40).

Defendant Richard Fricks testified, *inter alia,* as follows: One day, when he was cutting wood pulp, he met Seay and Gaddis, and Seay asked if he would be interested in making liquor (R. 62–63). That evening Seay brought to Fricks' house two loads of sugar and asked Fricks to repack them and burn the paper bags in which they were brought (R. 64–65). The next day, Seay and Gaddis came back with sugar and malt (R. 66). Fricks, Gaddis, Smith, and Crane dug holes back of Smith's house and set up six groundhog stills (R. 68–69). Seay arranged to have Gaddis board with Fricks while he was working at the stills (R. 73–74). Fricks received $35 from Seay which he gave to Smith (R. 82). Fricks also testified that, while he did not "make a run" at the stills (R. 71), he saw Seay and one Mabry haul liquor away from Smith's house (R. 80–81, 100–101).

Fricks' testimony was in general [1] confirmed by that of Arnold Smith (R. 131–157), Claude Crane

[1] There were differences in detail. For example, Fricks testified that Seay brought the lumber for the stills (R. 69) whereas Smith testified that he and Fricks went to get the lumber (R. 133). Fricks testified that Seay hauled two loads of liquor (R. 80), whereas Smith said he took one (R. 154).

(R. 157–172) and Fricks' wife (R. 177–188). Smith and Crane testified that they made liquor at the still, together with Gaddis (R. 139, 158–159, 170), and Smith testified that the liquor was stored at his home (R. 140, 145–146). Smith and Mrs. Fricks testified that the still was started in June 1952 (R. 145, 155, 188).

Petitioners did not take the stand and did not offer any evidence relating to the matters on which they were charged. The only two witnesses, who were called on their behalf, testified solely as to the poor character and reputation of government witnesses Richard Fricks and Crane (R. 209–212).

2. *Facts bearing on the motion for a mistrial.*— The conspiracy count of the indictment alleged that petitioners and others had entered into an agreement to operate an unregistered still in the latter part of June 1952 and that various overt acts in furtherance of the conspiracy were committed in July 1952 (R. 3–5). At the commencement of the trial, which was held in October 1953, petitioners' counsel had invoked the rule to exclude prospective witnesses from the courtroom while testimony was being given (R. 8).

Fricks, who was 32 years old and could neither read nor write (R. 61, 82), had not, on direct examination, placed the date of his encounter with Gaddis and Seay except that it was one day when he was cutting wood (R. 62). On cross-examination, when first asked about the date, he

said it was in 1942, but changed that to 1952 (R. 87). He testified that he could not remember the month in 1952, but thought it was "along in the summertime, up toward fall of the year" (R. 90), maybe October (R. 90–92). After a recess during his cross-examination (R. 109), he testified that the events had occurred in June (R. 117–118). He said no one had talked to him about the change of dates (R. 118), that he had not talked with government counsel and had not seen counsel talking with his wife in the witness room during recess (R. 123–124). When Mrs. Fricks was on the stand, she testified that Seay brought the sugar to the house in June (R. 188). She stated that she had talked with government counsel (R. 188), and that he had said something about her husband forgetting the date (R. 189–190). She also testified that he did not tell her anything, and that she already knew the date (R. 189, 190). She said she did not talk to her husband about the date (R. 191).

Government counsel was thereupon called to the stand and testified, in the presence of the jury, as follows: During the recess taken while Fricks was testifying, he talked with Mrs. Fricks and told her that she would probably be the next witness, and that Mr. Fricks had been a little confused by defendants' counsel's cross-examination as to the dates of the conspiracy (R. 193). During this conversation, Mr. Fricks came by and

government counsel remarked to him "You got a little out of order, my boy, on your dates, because you didn't remember" (R. 194).[2]

Petitioners' counsel moved for a mistrial on the basis of this testimony (R. 196). The judge, after hearing argument in the absence of the jury (R. 197–204), denied the motion (R. 205). On recalling the jury, he specially instructed them regarding this incident, as follows (R. 204–205):

> Gentlemen of the Jury, it is the law that persons trying cases, both civil and criminal, have the right to have the witnesses excluded from the Courtroom, sent out where the one witness would not hear another witness testify, and that primarily is the object of sending the witnesses out of the Courtroom where one witness cannot know what another witness has testified in that particular trial. Of course, it is improper for one of the attorneys connected with the case to tell one witness what the preceding witness has testified because that conceivably might have some influence on the testimony that this witness is to deliver. You have heard the testimony of these two witnesses, Mr. Fricks and Mrs. Fricks, and you have also heard Mr. Tysinger's statement with respect to his conversation with them. Now, I instruct you that you may

[2] When Fricks was recalled, he testified that he had forgotten that government counsel had talked with his wife during recess. He again testified that government counsel had not talked to him. (R. 207.)

> consider all of those circumstances in determining just what weight and credit you will give to the testimony of Mr. and Mrs. Fricks. Their credibility is a matter entirely for your determination, and you may, of course, consider all the facts and circumstances of the case in determining just what weight and credit you will give to their testimony, but I particularly instruct you that you may also consider the fact that Mr. Tysinger did talk to Mrs. Fricks, and also to Mr. Fricks after Mr. Fricks had first testified and before he testified a second time, and before his wife testified, and in determining what weight and credit you will give to the testimony of Mr. Fricks and Mrs. Fricks you may consider those facts and circumstances.

In affirming petitioners' convictions, the Court of Appeals considered the matter and concluded that the trial court had properly handled the incident since it "went only to the credibility of the witnesses; and since the jury was fully instructed upon that point" (Pet. 17).

ARGUMENT

The decision below is clearly correct and no conflict or question of importance is presented.

The sole issue is whether, under the circumstances of the case, petitioners were denied a fair trial by reason of the single incident involving government counsel's conversation with Mrs. Fricks and his incidental remark to Mr. Fricks

that "You got a little out of order, my boy, on your dates". As has already been pointed out, *supra,* pp. 5–6, the facts relating to this incident were fully developed by testimony before the jury (R. 193–195). Thereafter, before any further testimony was taken, the trial judge correctly informed the jury regarding the incident and told them that they might specifically consider it in determining the credibility of both Mr. and Mrs. Fricks' testimony (R. 204–215). Obviously, under the circumstances, the incident could not have had any adverse effect on the verdict.

This conclusion is further reinforced by a review of the record as a whole, which shows that Mr. Fricks was so obviously mistaken in fixing the date of his own and of petitioners' participation in the illegal distilling enterprise several months after the still had been seized, that it would have been clear to the jury, without any change of testimony by Fricks, that he was confused as to dates.[3] Since the still had been seized in July 1952 it was evident that the meeting with Seay and Gaddis to which Fricks testified could not have occurred in October 1952. Other witnesses also definitely placed the conspiracy in June 1952. (See *supra,* p. 4.)

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[3] Mr. Fricks had stated that he did not remember which month the incident occurred (R. 90–91) and stated it was "along in the summertime, up toward fall of the year," before stating that it might have been in October.

There is no testimony that the prosecutor told either Mr. or Mrs. Fricks what the correct dates were; he merely called their attention to the fact that Mr. Fricks had, on cross-examination, become confused. If Fricks had not changed his testimony during cross-examination, government counsel could properly have called his attention to inconsistencies between his testimony on the stand and any prior statements he had made. See *Hyde* v. *United States,* 225 U. S. 347, 377–378; *Hickory* v. *United States,* 151 U. S. 303, 309. That he mentioned this out of the presence of the jury after the rule on witnesses had been invoked may perhaps have been improper, but certainly it was not under the circumstances prejudicial nor did it operate to deprive petitioners of a fair trial.

We, of course, recognize that this Court has repeatedly indicated that the doctrine of harmless error is not one to be invoked indiscriminately in criminal cases. In the leading case of *Kotteakos* v. *United States,* 328 U. S. 750, 764–765, the harmless error rule was thus stated:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping

> the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

See also *Bollenbach* v. *United States,* 326 U. S. 607, 614–615. Whether the incident here is judged in accordance with this standard, or even in accordance with the earlier standard of *Crawford* v. *United States,* 212 U. S. 183, 203, which was decided before the enactment of the federal harmless error statute, 40 Stat. 1181, 28 U. S. C. (1946 ed.) 391,[4] it is wholly evident that the incident could not have harmed petitioners, particularly in view of the way in which the matter was handled by the trial judge.

The judge's careful instructions to the jury placed the incident in proper perspective and fully protected petitioners' rights. In fact it is at least as probable as not that the testimony respecting the recess incident if anything aided

[4] The statute has been superseded in criminal cases by Rule 52 (a) of the Federal Rules of Criminal Procedure, which did not in any way alter the scope of the harmless error doctrine. See *Bihn* v. *United States,* 328 U. S. 633, 638.

petitioners by casting somewhat greater doubt on the credibility of the Fricks than was actually warranted. Under these circumstances, the trial judge correctly denied petitioners' motion for a mistrial. His ruling with respect thereto presents no issue for which there is any occasion for further review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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